



[4830-01-p]

## DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9627]

RIN 1545-BL04

Mixed Straddles; Straddle-by-Straddle Identification Under Section 1092(b)(2)(A)(i)(I)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains guidance for those taxpayers electing to establish a mixed straddle using straddle-by-straddle identification. These temporary regulations explain how to account for unrealized gain or loss on a position held by a taxpayer prior to the time the taxpayer establishes a mixed straddle using straddle-by-straddle identification. The text of these temporary regulations also serves as the text of the proposed regulations (REG-112815-12) set forth in the Proposed Rules section in this issue of the **Federal Register**.

DATES: Effective Date: These regulations are effective on **[INSERT DATE OF FILING OF THIS DOCUMENT FOR PUBLIC INSPECTION]**.

Applicability Date: For the date of applicability, see §1.1092(b)-6T(c).

FOR FURTHER INFORMATION CONTACT: Elizabeth M. Bouzis or Robert B. Williams at (202) 622-3950 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

**Background and Explanation of Provisions**

The Tax Reform Act of 1984 (Public Law 98-369, 98 Stat. 494) amended section 1092(b) of the Internal Revenue Code (Code) to add, among other items, an election to establish a mixed straddle using straddle-by-straddle identification (a section 1092(b)(2) identified mixed straddle).

On January 24, 1985, the Treasury Department and the IRS published a notice of proposed rulemaking by cross-reference to temporary regulations (50 FR 3351, January 24, 1985). Included in the temporary regulations was §1.1092(b)-3T (TD 8008, 1985-1 CB 276), which describes how to account for a section 1092(b)(2) identified mixed straddle. In particular, §1.1092(b)-3T(b)(6) currently requires that unrealized gain or loss on a position that becomes a position in a section 1092(b)(2) identified mixed straddle be recognized on the day prior to establishing the section 1092(b)(2) identified mixed straddle. After filing of these temporary regulations in the **Federal Register**, §1.1092(b)-3T(b)(6) will apply to only those section 1092(b)(2) identified mixed straddles established on or before **[INSERT DATE OF FILING OF THIS DOCUMENT FOR PUBLIC INSPECTION]**.

The approach taken in §1.1092(b)-3T(b)(6) is suggested by the legislative history of section 1092, but it has come to the attention of the Treasury Department and the IRS that this paragraph arguably permits taxpayers to selectively recognize gains and losses in inappropriate circumstances and without market constraints. Thus, for example, a taxpayer could seek to use the identified mixed straddle rules in §1.1092(b)-3T(b)(6) to accelerate a loss on a position that could not be marked to market or easily disposed of. When

taxpayers use the section 1092(b)(2) identified mixed straddle rules to serve as an alternative to selling or otherwise disposing of a position, the general rules governing when gain and loss are recognized are undermined. The Treasury Department and the IRS believe that it is appropriate to act promptly to prevent these types of transactions because they represent a use of section 1092 that was not intended. Accordingly, these temporary regulations add a new §1.1092(b)-6T and limit the application of §1.1092(b)-3T as described in this preamble. Section 1.1092(b)-6T will apply to all section 1092(b)(2) identified mixed straddles established after **INSERT DATE OF FILING OF THIS DOCUMENT FOR PUBLIC INSPECTION**.

Section 1.1092(b)-6T provides that unrealized gain or loss on a position held prior to establishing a section 1092(b)(2) identified mixed straddle is taken into account at the time, and has the character, provided by provisions of the Code that would apply if the section 1092(b)(2) identified mixed straddle had not been established, rather than on the day prior to establishing the section 1092(b)(2) identified mixed straddle as is required by §1.1092(b)-3T(b)(6). Section 1.1092(b)-6T does not, however, override other provisions that require the recognition of gain or loss. Thus, for example, if a taxpayer enters into a transaction that creates a constructive sale under section 1259, the rules of section 1259 continue to apply. Under §1.1092(b)-6T, the provisions of §1.1092(b)-3T, with the exception of §1.1092(b)-3T(b)(6), will also continue to apply to changes in the value of a position held after a section 1092(b)(2) identified mixed straddle is established. As a result, pre-straddle gain or loss will

be accounted for under other provisions of the Code, while gain or loss incurred while the straddle is in place will be accounted for using the straddle rules in section 1092. Under §1.1092(b)-6T, the holding period of a position held prior to establishing a section 1092(b)(2) identified mixed straddle will continue to be determined using the rules in §1.1092(b)-2T.

It is important to account for pre-straddle gain and loss separately from gain and loss on positions while a straddle is in place. Therefore, §1.1092(b)-6T will continue to require the segregation of pre-straddle and straddle period gain and loss, but it will do so without requiring current recognition of unrealized gain and loss.

Section 1.1092(b)-6T will apply to all section 1092(b)(2) identified mixed straddles established after **[INSERT DATE OF FILING OF THIS DOCUMENT FOR PUBLIC INSPECTION]**, regardless of when any position that is a component of the section 1092(b)(2) identified mixed straddle was purchased or otherwise acquired.

### **Special Analyses**

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. For the applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6) refer to the Special Analyses section of the preamble to the cross-reference notice of proposed rulemaking

published in the Proposed Rules section in this issue of the **Federal Register**.

Pursuant to section 7805(f) of the Code, these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

### **Drafting Information**

The principal author of these regulations is Elizabeth M. Bouzis, Office of Associate Chief Counsel (Financial Institutions and Products). However, other personnel from the Treasury Department and the IRS participated in their development.

### **List of Subjects in 26 CFR Part 1**

Income taxes, Reporting and recordkeeping requirements.

### **Amendments to the Regulations**

Accordingly, 26 CFR part 1 is amended as follows:

### **PART 1--INCOME TAXES**

Paragraph 1. The authority citation for part 1 is amended by adding entries in numerical order to read as follows:

Authority: 26 U.S.C. 7805\* \* \*

Section 1.1092(b)-6T also issued under 26 U.S.C. 1092(b)(1).

Section 1.1092(b)-6T also issued under 26 U.S.C. 1092(b)(2).\* \* \*

Par. 2. Section 1.1092(b)-3T is amended by:

1. Revising the paragraph heading of paragraph (b)(6).
2. Adding a new first sentence to paragraph (b)(6).

The revision and addition read as follows:

§1.1092(b)-3T Mixed straddles; straddle-by-straddle identification under section 1092(b)(2)(A)(i)(I) (Temporary).

\* \* \* \* \*

(b) \* \* \*

(6) Accrued gain and loss with respect to positions of a section 1092(b)(2) identified mixed straddle established on or before [INSERT DATE OF FILING OF THIS DOCUMENT FOR PUBLIC INSPECTION]. The rules of this paragraph (b)(6) apply to all section 1092(b)(2) identified mixed straddles established on or before [INSERT DATE OF FILING OF THIS DOCUMENT FOR PUBLIC INSPECTION]; see §1.1092(b)-6T for section 1092(b)(2) identified mixed straddles established after [INSERT DATE OF FILING OF THIS DOCUMENT FOR PUBLIC INSPECTION]. \* \* \*

\* \* \* \* \*

Par. 3. Section 1.1092(b)-6T is added to read as follows:

§1.1092(b)-6T Mixed straddles; accrued gain and loss associated with a position that becomes part of a section 1092(b)(2) identified mixed straddle that is established after [INSERT DATE OF FILING OF THIS DOCUMENT FOR PUBLIC INSPECTION] (Temporary).

(a) In general. Except as otherwise provided, if one or more positions of a section 1092(b)(2) identified mixed straddle were held by the taxpayer on the day prior to the day the section 1092(b)(2) identified mixed straddle is established, any unrealized gain or loss on the day prior to the day the section 1092(b)(2) identified mixed straddle is established with respect to such position or positions is taken into account at the time, and has the character, provided by the provisions of the Internal Revenue Code that would apply to the gain or loss if the

section 1092(b)(2) identified mixed straddle were not established. Unrealized gain or loss is the difference between the fair market value of the position or positions on the day before a section 1092(b)(2) identified mixed straddle is established and the taxpayer's basis in that position or positions. See §1.1092(b)-2T for treatment of holding periods with respect to such positions. Changes in value of the position or positions that occur after the section 1092(b)(2) identified mixed straddle is established are accounted for under the other provisions of §1.1092(b)-3T.

(b) Examples. Paragraph (a) of this section may be illustrated by the following examples. It is assumed in each example that the positions are the only positions held directly or indirectly (through a related person or flowthrough entity) by an individual calendar year taxpayer during the taxable year and no section 1256 contract is substantially identical to an offsetting non-section 1256 contract. It is also assumed that any gain or loss recognized on disposition of any position in the straddle would be capital gain or loss.

Example 1. On August 13, 2013, A enters into a section 1256 contract. As of the close of the day on August 15, 2013, there is \$500 of unrealized loss on the section 1256 contract. On August 16, 2013, A enters into an offsetting non-section 1256 position and makes a valid election to treat the straddle as a section 1092(b)(2) identified mixed straddle. A continues to hold both positions of the section 1092(b)(2) identified mixed straddle on January 1, 2014. Under these circumstances, A will recognize the \$500 loss on the section 1256 contract that existed prior to establishing the section 1092(b)(2) identified mixed straddle on the last business day of 2013 because the section 1256 contract would be treated as sold on December 31, 2013, (the last business day of the taxable year) under section 1256(a). The loss recognized in 2013 will be treated as 60% long-term capital loss and 40% short-term capital loss. All gains and losses occurring after the section 1092(b)(2) identified mixed straddle is established are accounted for under the applicable provisions in §1.1092(b)-3T.

Example 2. On September 3, 2012, A enters into a non-section 1256 position. As of the close of the day on August 22, 2013, there is \$400 of

unrealized short-term capital gain on the non-section 1256 position. On August 23, 2013, A enters into an offsetting section 1256 contract and makes a valid election to treat the straddle as a section 1092(b)(2) identified mixed straddle. On September 10, 2013, A closes out the section 1256 contract at a \$500 loss and disposes of the non-section 1256 position, realizing an \$875 gain. Under these circumstances, A has \$400 of short-term capital gain attributable to the non-section 1256 position prior to the day the section 1092(b)(2) identified mixed straddle was established. The \$400 unrealized gain earned on the non-section 1256 position will be recognized on September 10, 2013, when the non-section 1256 position is disposed of. The gain will be short-term capital gain because, if the non-section 1256 position had been disposed of prior to establishing the section 1092(b)(2) identified mixed straddle, the gain would not have been long-term capital gain. See §1.1092(b)-2T for rules concerning holding period. On September 10, 2013, the gain of \$875 on the non-section 1256 position will be reduced to \$475 to take into account the \$400 of unrealized gain when the section 1092(b)(2) identified mixed straddle was established. The \$475 gain on the non-section 1256 position will be offset by the \$500 loss on the section 1256 contract. The net loss of \$25 from the straddle will be treated as 60% long-term capital loss and 40% short-term capital loss because it is attributable to the section 1256 contract.

(c) Effective/applicability date. The rules of this section apply to all section

1092(b)(2) identified mixed straddles established after [INSERT DATE OF FILING OF THIS DOCUMENT FOR PUBLIC INSPECTION].



(d) Expiration date. The applicability of this section expires on August 1, 2016.

Beth Tucker

Deputy Commissioner for Operations Support.

Approved: June 16, 2013

Mark J. Mazur

Assistant Secretary of the Treasury (Tax Policy).

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